

No. 4231

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

D. J. MURRAY MANUFACTURING  
COMPANY, a corporation,

Appellant,

vs.

SUMNER IRON WORKS, a corporation  
and SILVERTON LUMBER COM-  
PANY, a corporation,

Appellees.

APPELLANT'S PETITION FOR RE-HEARING

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## APPELLANT'S PETITION FOR RE-HEARING

The appellant prays for a rehearing of this appeal for the reason that the question of law on which the case was decided against appellant was not argued or presented on this appeal and appellant now prays to be heard.

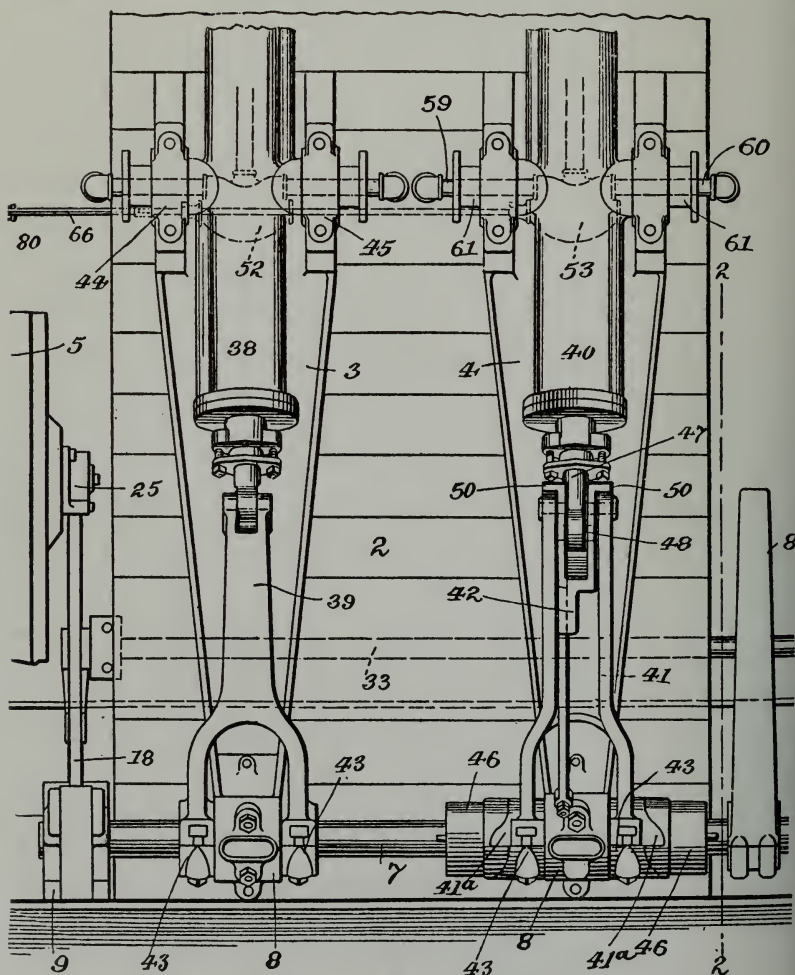
This case, as will be recalled, involves Claim 12 of the patent granted to C. E. Cleveland for improvement in Log Handling Mechanism, No. 933,231, September 7, 1909, and assigned to appellant.

The lower Court in a very brief opinion held the claim invalid for lack of invention.



This Court, however, found that Cleveland made “undoubtedly an improvement” in the art, but construed Claim 12 as not properly claiming the invention.

A copy of the patent will be found in the supplement of Exhibits to Transcript of Record. It is also detailed on pages 7 and 8 of Appellant’s Brief. For convenient reference Fig. 3 of the patent drawings illustrating the combination set forth by Claim 12, and that part of the specification particularly describing the same is here reproduced.



In the specification of the patent, page 1, line 44, the main object of the invention is stated to be "*to produce a simple and efficient (log) loading mechanism.*"

On page 2 of the specification, reading from line 112, the patentee said:

"Each of the cylinder supporting bed-plates 3 and 4 is alike in form, being a broad, *straight casting* provided at its outer end with a bearing 43 which embraces the shaft 7, and with bearings 44 and 45 for the trunnions of the cylinder. As will be seen upon reference to Fig. 3, the lower or outer end of each of the arms 39 and 41 is forked or bifurcated, the members or bearings 43 making a close fit against the boxes or bearings 8. Thus *said arms get a relatively wide bearing* upon the shaft and *the parts all serve to mutually support and sustain each other, the straight and relatively broad bed-plate standing the strains* to which it may be subjected much better than the usual crooked plates now in use."

This Court, in passing on the question of invention, in its opinion said (page 2, line 4):

"Log turners were old in the art, several patents having been issued to cover combinations more or less similar to that which was described in the Cleveland patent. *The Cleveland log turner was undoubtedly an improvement on those which preceded it. The appellee, attracted by its features, took advice of counsel as to the validity of Claim 12,*

and acting thereon, *deliberately imitated the Cleveland machine*. One of the improvements in that combination is *the bed-plate* which Cleveland used. All prior log turners that had bed-plates used a plate with the shaft bearing offset to one side of the center of the cylinder. *Cleveland's bed-plate was placed in direct line with the center of the cylinder and push arm, and the evidence indicates that such construction was advantageous in equalizing the strain and obviating breakage of the bed-plate*. But *the peculiar form of Cleveland's bed-plate* is not made an element of Claim 12."

And supplemented the last sentence by saying (Opinion, Page 3, line 3):

"The Cleveland log turner accomplishes no new result. So far as the mere handling and turning of logs is concerned it is no better and no more efficient than the log turners which preceded it. *Its only advantage is in the cheapness of its construction and the increased strength of its component parts and the consequent avoidance of breakage*. This is not effected by any new element in the combination."

The question as to what device the claim describes is one wholly of law.

2 Robinson on Patents, Sec. 732.

The question as to what is the true interpretation of the Cleveland claim was not argued in the Court below.

Therefore appellant did not consider that point involved in the case. The only question which appellant believed presented by the appeal was, whether the Cleveland improvement constitutes invention.

Appellee's brief in this Court merely asserted in substance, at page 75, that while Courts will give pioneer patents the benefit of liberal construction, an improvement patent must be *strictly* construed. But no authorities sustaining such doctrine were cited, and it is submitted such doctrine is fundamentally wrong.

*The question was not argued on the hearing of this appeal as will be remembered.*

It is submitted that the affirmance of the decree of the lower Court is unjust to appellant for the following reasons:

1. An improvement patent is entitled to the same liberal construction as a pioneer patent.

2. A liberal construction of said claim requires that the term "bed-plate" be interpreted *to designate only the particular form of bed-plate specifically described and illustrated in patentee's specification and drawings.*

This point is developed on page 9 et seq.

3. General words in a claim are sometimes to be limited by particular words in the specification. *The specification describes, and the drawing shows only a bed-plate consisting of a "STRAIGHT CASTING".*

This point is developed on page 16 et seq.



4. The Court is not asked to omit nor to interpolate anything, but *is merely so to interpret the language of said claim as to make it conform* to the descriptive part of the specification, and the drawings.

The patentee having described and illustrated but one form of construction of his bed-plate, *the presumption is that* that form at least is preferred, and was specifically intended to be referred to by the general language of the claim, and thus renders the claim valid rather than that the language was intended to designate *any form* of bed plate, or any other arrangement, and thus render the claim invalid; particularly so where the latter construction manifestly would *imagine a device incapable* of carrying out the purpose of the invention.

**An improvement patent is entitled to the same liberal construction as a pioneer patent.**

Appellee in asserting that there is a difference between the construction of a pioneer patent and an improvement patent evidently misinterpreted the language sometimes applied to the interpretation of a claim when the question of infringement is at issue. The question of infringement frequently involves a question of equivalency. With the latter question we are not here concerned; infringement by an exact copy being conceded by appellee.

In *Eibel Process Co. vs. Minn. Ont. Paper Co.*, 261 U. S. 46, 62, 67 L. Ed. 523, 532, Chief Justice Taft said:



“\* \* \* Eibel made a very useful discovery which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a *patent which is only an improvement on an old machine may be very meritorious and entitled to liberal treatment.* Indeed, when one notes the crude working of machines of famous pioneer inventions and discoveries, and compares them with the modern machines and processes exemplifying the principle of pioneer discovery, *one hesitates in the division of credit between the original inventor and the improvers; and certainly finds no reason to withhold from the really meritorious improver, the application of the rule ‘ut res magis valet quam pereat,’* which has been sustained in so many cases in this Court.” <sup>1</sup>(Citing several authorities.)

The maxim “*ut res magis valet quam pereat*” was applied in the construction of patents at a very early date.

In *Ryan vs. Goodwin*, 21 Fed. Cas. 110, 112 (12186) (1839), Story, Circuit Justice state it to be a clear rule of our law—

“to carry in effect the obvious object of the constitution and laws in granting patents, ‘to promote the progress of science and useful arts,’ to give a liberal construction to the language of all patents and specifications (quoting the maxim) so as *to protect and not to destroy the rights of real inventors.* If, therefore, there be any ambiguity or my uncertainty in, any part of the specification;

*yet if taking the whole together, the court can perceive the exact nature and extent of the claim made by the inventor, it is bound to adopt that interpretation, and to give it full effect."*

In *Eibel Process Company vs. Minn. & Ont. Paper Co.*, supra, Chief Justice Taft said:

(7) "The next objection to the patent which prevailed in the Circuit Court of Appeals is that its terms are too vague because the extent of the factor of pitch is not defined except by the terms 'substantial' and 'high.' *The figure accompanying the specification and illustrating the improvement indicates an angle of four per cent. \* \* \**" [Note here that *the patent drawing* is also to be taken expressly into consideration in defining the patent claim.] "Indefiniteness is objectionable because the patent does not disclose to the public how the discovery, if there is one, can be made useful and how its infringement may be avoided. We do not think any such consequences are involved here. This patent and its *specifications were manifested to readers who were skilled in the art of paper making and versed in the use of the Fourdrinier machine. The evidence discloses that one, so skilled had no difficulty, when his attention was called to their importance, in fixing the place of the disturbance and ripples to be removed, or in determining what was the substantial pitch needed to equalize the speeds of the stock and wire at that place. The immediate and successful use of the*

pitch for this purpose by the owners of the then fastest machines and by the whole trade is *convincing proof* that one versed in paper making could find in Eibel's specifications all he needed to know, to avail himself of the invention."

**A liberal construction of said claim requires that the term "bed-plate" be interpreted to designate only the particular form of bed plate specifically described and illustrated in patentee's specification and drawings.**

2 Robinson on Patents, Sec. 523, states:

The attitude of the courts towards the inventor, in its interpretation, is just and *liberal*. "Thus, though the Claim is distinct from the description, and as such must be complete in itself and not merely refer to the description for a statement of the invention claimed, yet *every feature of the invention which the description has declared to be essential*, and all the modes of using it therein prescribed, *are covered by the claim, whether or not they are particularly mentioned*. Without departing from the rule that the claim must clearly limit and define the exact invention for which a patent is desired, or assuming the power to alter or enlarge a claim, *the courts sustain it whenever in connection with its proper exponent, the description, and in view of the state of the art, it renders the nature of the claimed invention evident to those to whom the specification is addressed.*"

In Section 738 of the same work, it is stated:

*“The object of interpretation is to make the indefinite exact and the doubtful plain.”* And where the language of the patent fails to define with precision, or to describe with clearness the interpretative power “must then be *employed for the removal not the creation of ambiguities, and for the erection not the destruction of limitations to the inventor’s claim.*”

In Section 743 (Ib) it is stated:

“In construing the claims of a patent by its descriptive portion, the *scope of the claim may often be restricted*, but can never be enlarged \* \* \*.”  
“*When the claims exceed \* \* \* an interpretation of the descriptive matter, they must be restricted by it.*”

In Walker on Patents, 4th Ed., Sec. 185, p. 131, it is stated:

“A patent should be construed in a liberal spirit to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his labors.” (Citing *Rubber Co. vs. Goodyear*, 9 Wal. 788; 19 L. Ed. 566, 568.) \* \* \* “*That liberality as often shows itself in a narrow construction as in a broad one; for a narrow construction may be as*



necessary to establish the novelty of a patent, as a broad construction is to lay the foundation for proof of its infringement. Therefore *when it becomes necessary to construe the claims narrowly in order that its novelty may not be negative by the prior art, courts will give such a narrow construction, if they can do so consistently with the language of the claim and of the description.*" (Citing Klein vs. Russell, 19 Wall. 433, 22 L. Ed. 117; Jones vs. Barker, 11 Fed. 600.)

In Brooks vs. Fiske (1853) 15 How, 212, 223, 14 L. Ed. 665, it is stated:

"The patentee ought to state distinctly what it is for which he claims a patent and describe the limits of the monopoly; \* \* \* it is for the purpose of warning an innocent purchaser, or, other person, using the machine of his infringement, and at the same time of taking from the inventor the means of practicing upon the credulity or fears of other persons, by pretending that his invention was different from its ostensible objects."

The court then criticized the language of the claim, but added:

"*The claim, or summing up, however, is not to be taken alone, but in connection with the specification and drawings; the whole instrument is to be construed together.* But we are to look at the others only for the purpose of enabling us correctly to interpret the claim."

In *Winans vs. Denmead* (1853), 15 How. 330, 14 L. Ed. 717, 722, Justice Curtis said:

“Specifications are to be construed liberally, in accordance with the design of the constitution and the patent statutes of the United States, to promote the progress of the useful art and allow inventors to retain to their own use not anything which is matter of common right, but what they themselves have created.”

In *Corning vs. Burden* (1853), 15 How. 251, 14 L. Ed. 683, 691, the Court said:

“It is true that the patentee, after describing his machine, has set forth his claim in rather ambiguous and equivocal terms which might be construed to mean either a process or machine. In such case the construction *should be that which is most favorable to the patent ‘ut res magis valeat pareat.’* His patent bearing a title which claims a machine, and his specification, describing a machine, to construe his claim as far as the function effect or result of his machine would certainly endanger, if not destroy, its validity.”

*Brooks vs. Fisk*, was cited with approval in *Bates vs. Coe*, (1878), 98 U. S. 31; 25 L. Ed. 68, 71, Justice Clifford saying:

“Apply that rule to the case, and it follows that there is a substantial variance between the claims of the patent and the description of the invention or inventions described in the specification.

“In construing patents, it is the province of the court to determine what the subject matter is upon the whole face of the specification and the accompanying drawings.” The court, accordingly, construed the invention as “an improved drilling machine, *composed of the devices pointed out in the specification* which operate and perform the functions therein described. \* \* \* *Construed in that way, as the specification should be, it is clear that the whole invention \* \* \* is sufficiently described both in the specification and in the claims of the patent, and that the objections of the respondents in that regard must be overruled.*”

“Cases arise not infrequently, where the actual invention described in the specification is larger than the claims of the patent; and in such cases it is undoubtedly true that the patentee in a suit for infringement must be limited to what is specified in the claims annexed to the specification; but it is equally true that the claims of the patent, like other provisions in writing, *must be reasonably construed*, in case of doubt or ambiguity it is *proper in all cases to refer back to the descriptive portions to aid in solving the doubt or in ascertaining the true intent and meaning of the language employed in the claims*; nor is it incorrect to say that due reference may be had to the specification, drawings and claims of a patent in order to ascertain the true legal construction.”

In *Werner vs. King* (1877), 96 U. S. 218; 24 L. Ed. 613, the patent claim read:

“What I claim as new and desire to secure by letters patent is: “The guide E constructed with one or more curved or arched portions *a* in combination with suitable rollers substantially as described.”

Justice Miller said:

*Where form is the essence of the invention, it is necessarily material; and if the same object can be attained by a machine different in form, where that form is inseparable from the successful operation of the instrument, there is no infringement.”* Citing *Winans vs. Denmead*, 15 How. 330, 14 L. Ed. 717.

*In the Cleveland invention the particular form of his bed-plate, as described in the descriptive part of his specification and illustrated by the patent drawings was the only form which would lend itself to the successful attainment of the results he had in mind; and his specification drawings and claim construed together, fairly and unmistakably, advises the public that it is free to use any other form of bed-plate. Therefore, Cleveland claimed only his own invention; he made no pretence to claim anything else; the appellee does not so assert; it made what may be termed a Chinese copy of claim 12, while it was free to adopt any construction disclosed by the prior art, with which appellee was as familiar as the inventor.*



The requirements of the patent statutes were intended to apprise the public of the nature of the invention; they were not intended to facilitate dodging the patent.

The question is, did Cleveland fairly state his invention, so as to make it fully accessible to the public; did he comply with the statute which prescribes that "he shall particularly point out and distinctly claim the \* \* \* combinations which he claims as his invention or discovery."

*To assume a possible different form of bed-plate, or an arrangement of the parts otherwise than as directed in the body of the specification would disregard its instructions and frustrate the objects of the patent. For appellee to contend that under the language of the claim such other construction might be deemed included is to ignore not only the maxim above quoted, also the rules which commonly control the interpretation of contracts, but besides would produce an inoperative structure with respect to the purpose and result to be attained by Cleveland's improvement.*

*The fact that "Cleveland's bed-plate was placed in direct line with the center of the cylinder and the push arm" is apparent from said Fig. 3 of the drawings. And such feature is plain to any mechanic at all versed in the art by the above given excerpt from the specification. It is a feature inherent in the improvement, without which the result to be attained would be impossible.*

There was not even a suggestion on the part of appellee in either court, or in its brief, that the nature of Cleveland's invention was at all in doubt. Appellee understood it perfectly, and *deliberately copied* it, in order to make use of its benefits.

**General words in a claim are sometimes to be limited by particular words in the specification.**

In Jones vs. General Fire Proofing Company, 254 Fed. 97-100 (C. C. A., 6th, 1918), the Court remarked:

“Our conclusion is that this is a proper case for the application for the principle to which we have referred in Davis vs. New Departure Co., 217 Fed. 775. From the broad point of view involved in Claim 3 the new thing provided by Curtis was the diagonal edge over which the sheet should be drawn into another plane as it progressed longitudinally. This, we consider a new element in this association, and it imparts both validity and character to the claim. \* \* \* We do not overlook the fact that *this diagonal edge is not, in so many words, specified in claim 3; but we conclude that it is imperatively implied.* The claim calls for ‘a support over which the slitted sheet is moved,’ and since such a sheet could not be moved lengthwise of the support and drawn away from the plane of the support into expansion as it passes off the same, unless it passes off in a diagonal line, we must conclude that the ‘support’ of the claim is the support thus described.”

In *Hauser Awning Co. vs. Anton et al.*, C. C. A., 6th (1916), 233 Fed. 262, 264, the claim included among other elements, "An awning arm comprising two sections, pivoted together at their adjacent ends." The Court said:

"While it is well settled as a general rule that elements not named in a claim will not be read into it in order to save the claim from anticipation, it is equally *well recognized that when some general arrangement or environment was evidently intended by the patentee, is fully described in the specification, and is such that without it the whole device is inoperative, this feature will be deemed to have been contemplated by the patent grant, and to that extent, may be read into the claim.* 'This may be done with a view of showing the connection in which the device is used and proving it is an operative device.' *McCarty vs. R. R. Company*, 160 U. S. 110, 116; 40 L. Ed. 358, 361. *Here the thought that the awning arm should unfold by gravity only is not, in so many words, expressed in either claim, and is implied in the first claim less clearly than in the second; but it is expressed in the specification as one of the purposes the whole description, is appropriate to that idea and not to any other form, and we think it plain enough that the patent was intended to reach only that form. Under these conditions claims 1 and 2 should be interpreted as restricted to awning arms which operate by gravity. So restricted no anticipation appears \* \* \*.*"

In *Knox vs. Murtha* (1871), 14 Fed. Cas. 823, 824 (No. 7911), the Court said:

“This is a claim for a combination only, and one of the questions raised is whether the combination secured by it is limited to the use of a *tight smutter* or scourer, or whether it covers the use of *any form* of smutter or scourer in combination with the other elements described. If, as the defendant, insists, it be construed so as to confine the patent to a combination in which one element is a tight smutter or scourer, this action must fail, for the combination employed in the machine used by the defendants contains an open scourer, and does not contain a tight smutter or scourer. \* \* \*

*In the claim itself*, which designates the combination sought to be secured *no description is given of the scourer* which is stated to be an element of the combination sought to be secured. The words are ‘in combination with a smutter or scourer,’ and these words it is said, are sufficient to include any form of scourer then known. But, effect must be given to the words, “substantially as described,’ which are used in the claim and their effect is to refer to the specification for the description of the elements of the combination which is wanting in the claim. The *general words of the claim* in respect to the scourer *are, therefore, to be construed as limited by any particular description found in the specification.* \* \* \*

Only a *tight* scourer will answer to construction of the machine or combination described in the Shaw patent, and *by the use*



*of that form of scourer alone can the result be obtained which the patent declares to be the result sought by the invention \* \* \*."*

In *Stillwell Co. vs. Eufaula Co.*, 117 Fed. 410, C. C. A. 6th <sup>1</sup>(1902), it was held that when *the language of a claim for a combination includes an element duly described in general terms, the Court may look to the specification to ascertain its meaning, and the claim may be limited by the specification.* (p. 414)

In the last cited case, the claim ended with the words: "substantially as described." But it is indisputable that such words are *always understood* in each claim, and impart to it no special qualification, or any particular significance.

*National Tube Co. vs. Mark*, 216 Fed. 507, 518.  
C. C. A. 6th (1814.)

*Stillwell Co. vs. Eufaula Co.*, *supra*, cited many authorities, among them: *Hailes vs. Van Wormer* (1873), 20 Wall. 353, 22 L. Ed. 241, in which Justice Story said:

"The first claim \* \* \* is unquestionably too broad to be sustained unless limited to the means described in the specification. So it was doubtless intended to be limited by the patentee, for the claim speaks of the combination claimed as substantially as described, that is, described in the 17 L. Ed. 668, 672 (1863), the patent to be construed specifications."

In *Turrill vs. R. R. Company*, 1 Wall. 491, 510; 17 L. Ed. 668, 672, involved a device for welding up and reforming the ends of railroad rails. The combination stated in the patent included a movable press-block. It was contended and the lower Court so held, that since movable press-blocks in similar combinations were old, the patent was void, *the claim not specifying any particular form* of movable press-block. Justice Clifford, speaking for the Court, quoted Justice Story opinion in *Ryan vs. Goodwin*, *supra*, and said:

“Patents for inventions are not to be treated as mere monopolies, and therefore odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule, *ut res magis valeat quam pereat*, are, if practicable, to be so interpreted as *to uphold and not to destroy the right of the inventor.*”

\* \* \*

IV. “*Evidently the claim must be construed in connection with the explanation contained in the specification, and when viewed in that light it is quite clear that he should receive a more restricted construction than was given to it in the judgment of the Court. Special devices are described as combined and arranged in a particular manner and operate only in a special and peculiar way for a special purpose, and to effect a special result. Obviously it is not a claim for any kind of movable press-block, combined and operating in any way with any kind of fixed block to accomplish any*

purpose, or effect *any* kind of result. Giving that construction to the claim then, indeed, it would be true that the plaintiffs, when they admitted that movable press-blocks in combination with various shapes and used for various purposes were older than the invention of the patentee, did admit away their whole case, and, if viewed in that light, it would be equally true that there was no question of fact to be submitted to the jury. *But such is not the true construction of the patent, as is obvious from every one of the explanations of the specification.* Invention was of such a movable press-block as is described, having its edge formed to the side of the rail in combination with such other block as described, with its edge of similar but *reversed form arranged* as described and combined and operating *in the particular way described for the special purpose of effecting the desired result.*”

The foregoing case was cited by the Supreme Court in deciding the case of Eibel Process Com. vs. Minn. & Ont. Paper Co., *supra*.

In Bragg vs. Fitch <sup>1</sup>(1887), 121 U. S. 478, 30 L. Ed. 1009-1010, the Court said:

“It is obvious from the foregoing review of prior patents \* \* \* that in construing the claims of his patent they *must be restricted to the precise form and arrangements of parts described in his specification, and the purpose indicated therein.*”

In Norton vs. Jensen, 49 Fed. 859, 864, this Court, speaking by Judge Hawley, said:

“It is always the duty of the courts to construe the patents by a reference to the language of the claims and *an examination of the specifications and drawings* accompanying the same.”

In Curry vs. Union Elec. Welding Co., 230 Fed. 422, 426 (1916, C. C. A. 6th), it was held that:

“The *name of a part*, as an element of a claim, of necessity *carries us back to the specification* to see what that part is” just the same as if the name of that part in the claim had appended to it a *specific reference letter*, or the claim ended with the phrase ‘*substantially as described.*’”

In Hudson Mfg. Co. vs. Lowden Mach. Co. (1921), 276 Fed. 527, C. C. A. 8th, was involved patent No. 990,827, granted to William Lowden, April 25, 1911, for an improvement in Cattle Stanchions. The claim read:

“In cattle stanchions, two co-acting members having their center portions spaced apart and approximately parallel, and their upper and lower portions inclined towards each other, at a uniform angle, etc.”

The prior art showed stanchions with ends square and circular. (See sketch included in opinion.) The patent drawings show V-shaped ends. The contention of defendant was that the prior stanchion also had its ends formed at a uniform angle.



But the Court said (p. 532) :

“*Turning to the specification we find this: These members \* \* \* have their upper and lower ends bent towards each other at an angle of approximately 45 degrees. \* \* \** *The drawings which accompany the patent* referred to in that part of the specification just read, show the ends of the side members bent towards each other at an angle of approximately 45 degrees, and that they stand at approximately right angles to each other.

“*When the claims are thus interpreted and construed the conclusion which we have reached therefrom seems to necessarily follow, so that the patented improvement, as defined by the claims, when read in the light of the specification and drawings, consists in a stanchion having V-shaped ends bent towards each other at an angle of approximately 45 degrees and standing towards each other at approximately right angles.*

(p. 531) “<sup>1</sup>(2) *But appellant argues that the language of Claims 1, 2 and 3 is so simple, and their meaning clear, that the thing described is obvious, and that therefore there is no room for interpretation; hence the specification and drawings relied upon in reaching the foregoing conclusions cannot be resorted to. But none of the claims deals with the angle of the bends directly, though indirectly they require that the bends shall be at uniform angles, that is, ‘their upper and lower portions inclined towards each other at a uniform*

angle.' This requirement could be met by deflecting the ends so that they would circumscribe an obtuse angle, resulting in an *unusable and absurd structure*, or to circumscribe an angle so acute that it would be *wholly unfit for the intended purpose*.

\* \* \* *The specification and claims of a patent constitute a contract between the United States and the patentee*, and they are to be read and construed together in the same way, and by the same rules by which other contracts are interpreted.  
\* \* \*

**In the case at bar, the Court is not asked to omit nor to interpolate anything, but is merely so to interpret the language of said claim as to make it conform to the descriptive part of the specification, and the drawings.**

All the elements essential to the inventive thought, and the result to be attained are set forth in Claim 12, namely: (Doble v. Pelton, 186 Fed. 526)

"In a log-handling mechanism, the combination of a bed-plate provided at its outer end with a shaft-bearing; a shaft extending through said bearing; an arm in operative relation with the shaft, said arm being bifurcated and straddling the bearing formed upon the outer end of the bed-plate; a power cylinder pivotally mounted upon the bed-plate; and a piston rod working in the cylinder and connected at its outer end to the adjacent end of the arm."

The only criticism of this claim is "the *particular form of Cleveland's bed-plate* is not made an element" of it.

Now since a *bed-plate* is specified in the claim and its exact, and only usable form, is specifically described in the body of the specification, and is specifically illustrated in said Fig. 3 of the patent drawings, *would not the fair inference be that said particular form alone was intended to be covered by the claim?*

Infringement will not be found against one who comes within the *letter* of a claim, but not within the *spirit* of the invention..

Westinghouse vs. Boyden Co., 170 U. S. 537, 568; 42 L. Ed. 1136, 1147.

The same equitable principle should govern the interpretation of a patent for all purposes.

*Thus a patent covering a beneficial improvement, fully described in the body of the specification should not be taken from the inventor and destroyed because its claim does not comply with the letter of the law, although it fully complied with its spirit and intent.*

**The Cleveland claim must be interpreted by referring to, and by the aid of, the descriptive part of the specification and the drawings therein referred to.**

The combination described by Claim 12 is to be differentiated from the prior act, by referring to the body of the specification and the drawings in order to ascertain the true invention.

The element termed "a bed plate," in the light of the prior art, must be interpreted as designating the particular form of bed plate shown and described in the descriptive part of the specification and the drawings.

The element "*a bed-plate*" does not designate *any* form of bed-plate, nor *any* arrangement of it with the other elements, but *must be interpreted as designating the particular form of bed-plate shown and described in the descriptive part of the specification and the drawings*; especially so because *the patentee described only one form*, and has expressly stated that that form of bed-plate, and the particular arrangement of the parts combined therewith, *alone are capable of producing the result sought to be attained by the invention*.

When the instruction of the Cleveland specifications and his drawings are followed, *the placing of his bed-plate in direct line with the center of the cylinder and push arm is inevitable*.

To interpret the element "a bed-plate" as designating *any* form of bed-plate would do violence to plaintiff's plain description and illustration of his invention. To contend that his specification as a whole does not clearly and fully and distinctly define the patented invention, and *specifically the particular bed-plate* which he alone found capable of producing the result to be attained by his invention, would do violence to all rules governing the interpretation of ordinary contracts. *To contend that Claim 12 covers, or might even be construed to cover, any other form of bed-plate, or any arrangement of elements other than those alone and*



*particulars described in the body of the specification and illustrated by the drawings would be to distort the plain purpose of the Cleveland invention instead of aiding its interpretation.*

Appellee confesses on the record that it did not so misinterpret the invention, but to the contrary knew exactly what the invention claimed is, and "*deliberately imitated the Cleveland Machine.*"

Many further authorities might be cited but would serve no useful purpose. The rule of law which the Court is asked to apply is both plain and fair.

Cleveland fully and fairly complied with his part of the contract. He advanced the art, and so described his invention as to make it fully accessible to the public, and so as to make its exact nature readily understood. His claim states the combination by which his improvement may be carried into effect. No combination composed of parts as named and combined in Cleveland's Claim 12 is found in the prior art. *All* the parts of Cleveland combination, and their co-operative relation are intelligibly set forth in the claim when properly construed; and granting that if we might now redraft the claim, in the light of past events, we might improve it, after all the improvement of its language would merely deal with a matter of form and not of substance.

The parts composing the combination being specifically set forth by name, their peculiarities will be found by referring back to the specification and the drawings

constituting a part of the latter, and that is all the law requires of a patentee.

**THEREFORE**, appellant prays that a re-hearing may be granted in order that this Court may be fully advised and justice may be done.

Respectfully submitted,

**T. J. GEISLER,**  
Counsel for Applicant.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

**T. J. GESLER,**  
Counsel for Appellant.